

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Charlie Hartford	Team: Squad #8	CCRB Case #: 201900379	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input checked="" type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 12/20/2018 10:07 PM	Location of Incident: § 87(2)(b)	Precinct: 44	18 Mo. SOL 6/20/2020	EO SOL 2/4/2021	
Date/Time CV Reported Fri, 01/11/2019 7:34 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 01/11/2019 7:34 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Andrew Alvarado	23931	962919	044 PCT
2. POM Joseph Modica	25713	964174	044 PCT
3. Officers			
4. POM Scott Ferguson	22891	957576	044 PCT
5. SGT Timothy Burke	03879	950130	044 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POF Karyn Soto	12609	955522	044 PCT
2. POF Ana Alba	17376	963842	044 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Joseph Modica	Abuse: Police Officer Joseph Modica entered § 87(2)(b)	§ 87(2)(b)
B.POM Andrew Alvarado	Abuse: Police Officer Andrew Alvarado entered § 87(2)(b) in the Bronx.	§ 87(2)(b)
C.POM Joseph Modica	Abuse: Police Officer Joseph Modica searched § 87(2)(b)	§ 87(2)(b)
D.POM Andrew Alvarado	Abuse: Police Officer Andrew Alvarado searched § 87(2)(b) in the Bronx.	§ 87(2)(b)
E.POM Andrew Alvarado	Discourtesy: Police Officer Andrew Alvarado spoke discourteously to § 87(2)(b)	§ 87(2)(b)
F.POM Joseph Modica	Abuse: Police Officer Joseph Modica forcibly removed § 87(2)(b)	§ 87(2)(b)
G.POM Andrew Alvarado	Abuse: Police Officer Andrew Alvarado forcibly removed § 87(2)(b) to the hospital.	§ 87(2)(b)
H.POM Joseph Modica	Force: Police Officer Joseph Modica used a Taser against § 87(2)(b)	§ 87(2)(b)
I.POM Scott Ferguson	Force: Police Officer Scott Ferguson used a Taser against § 87(2)(b)	§ 87(2)(b)
J. Officers	Abuse: Officers damaged § 87(2)(b)'s property.	§ 87(2)(b)
K.SGT Timothy Burke	Discourtesy: Sergeant Timothy Burke spoke discourteously to § 87(2)(b)	§ 87(2)(b)

Officer(s)	Allegation	Investigator Recommendation
L. Officers	Off. Language: Officers made remarks to § 87(2)(b) based upon race.	
M.POM Andrew Alvarado	Abuse: Police Officer Andrew Alvarado searched § 87(2)(b) in the Bronx.	

Case Summary

On January 14, 2019, § 87(2)(b) filed this complaint via telephone with the CCRB.

At approximately 10:07 p.m. on December 20, 2018, Police Officer § 87(2)(b) Modica and Police Officer Andrew Alvarado of the 44th Precinct entered and searched § 87(2)(b) in the Bronx (**Allegations A-D: Abuse of Authority**, § 87(2)(g) PO Alvarado spoke discourteously to § 87(2)(b) (**Allegation E: Discourtesy**, § 87(2)(g) PO Modica and PO Alvarado forcibly removed § 87(2)(b) to the hospital (**Allegations F and G, Abuse of Authority**, § 87(2)(g) PO Modica and Police Officer Scott Ferguson of the 44th Precinct used a Taser against § 87(2)(b) (**Allegations H and I: Force**, § 87(2)(g) Officers allegedly damaged § 87(2)(b) property (**Allegation J: Abuse of Authority**, § 87(2)(g) Sergeant Timothy Burke of the 44th Precinct spoke discourteously to § 87(2)(b) (**Allegation K: Discourtesy**, § 87(2)(g). Officers allegedly made remarks to § 87(2)(b) based upon race (**Allegation L: Offensive Language**, § 87(2)(g) PO Alvarado searched a binder containing § 87(2)(b) personal documents (**Allegation M: Abuse of Authority**, § 87(2)(g)

This case contains body-worn camera footage (Board Reviews 08-15).

Findings and Recommendations

Allegation (A) Abuse of Authority: Police Officer Joseph Modica entered § 87(2)(b) in the Bronx.

Allegation (B) Abuse of Authority: Police Officer Andrew Alvarado entered § 87(2)(b) in the Bronx.

Allegation (C) Abuse of Authority: Police Officer Joseph Modica searched § 87(2)(b) in the Bronx.

Allegation (D) Abuse of Authority: Police Officer Andrew Alvarado searched § 87(2)(b) in the Bronx.

It is undisputed that at approximately 10:07 p.m. on December 20, 2018, PO Modica and PO Alvarado entered § 87(2)(b)'s residence at § 87(2)(b) in the Bronx, with the consent of § 87(2)(b) in response to a 911 call placed by § 87(2)(b) regarding his roommate accessing his computer files (Board Reviews 03-05). After PO Modica and PO Alvarado informed § 87(2)(b) that they were not going to prepare a police report, PO Modica and PO Alvarado remained in the residence while waiting for EMS to arrive and psychologically evaluate § 87(2)(b). It is undisputed that § 87(2)(b) never requested that the officers leave his residence.

All warrantless searches are presumptively unreasonable per *People v. Hodge*, 44 NY2d 553 [1978] (Board Review 24). However, in *People v. Cosme*, 48 NY2d 286 [1979], the Court also held that “it is well settled that the police may lawfully conduct a warrantless search when they have obtained the voluntary consent of a party who possesses the requisite degree of authority and control over the premises or personal property in question” (Board Review 25).

§ 87(2)(g)

Allegation (E) Discourtesy: Police Officer Andrew Alvarado spoke discourteously to § 87(2)(b)

It is undisputed that PO Alvarado told § 87(2)(b) that he was “not a bullshitter” and that he needed to speak to EMS “whether he liked it or not.” PO Alvarado may be heard making this statement at 12:32 minutes in his body-worn camera footage (Board Review 08). In his CCRB interview, PO Alvarado provided no justification for making these statements (Board Review 04).

Patrol Guide Section 203-10 instructs NYPD officers to refrain from using discourteous and disrespectful remarks towards civilians (Board Review 203-10).

The Deputy Commissioner of Trials has repeatedly held that “profane remarks, made during stressful situations or while an officer is trying to get a chaotic situation under control, are not misconduct” (Board Review 30).

§ 87(2)(g)

Allegation (F) Abuse of Authority: Police Officer Joseph Modica forcibly removed § 87(2)(b) to the hospital.

Allegation (G) Abuse of Authority: Police Officer Andrew Alvarado forcibly removed § 87(2)(b) to the hospital.

It is undisputed that § 87(2)(b) refused to talk to EMS, and that EMS personnel informed § 87(2)(b) that if he did not speak with them, they would force the officers to take him to the hospital. It is undisputed that § 87(2)(b) continued to refuse and was forcibly removed to the hospital.

Patrol Guide Procedure 216-01 requires officers to cooperate with ambulance/hospital personnel in every reasonable manner (Board Review 27).

§ 87(2)(g)

Allegation (H) Force: Police Officer Joseph Modica used a Taser against § 87(2)(b)

Allegation (I) Force: Police Officer Scott Ferguson used a Taser against § 87(2)(b)

In his sworn statement provided January 18, 2019, § 87(2)(b) stated that after an EMT told him he needed to respond in five seconds or he would be removed to the hospital, § 87(2)(b) responded by silently holding his hand in the air such that all five fingers were extended, then counting down by closing each finger one at a time (Board Review 03). The officers then grabbed § 87(2)(b) hands and legs, at which time § 87(2)(b) became scared of his anxiety. § 87(2)(b) stood up and tried to get away from the officers. § 87(2)(b) crossed his arms and held them in front of his chest “to make the work hard” for the officers, because he did not want to go to the hospital. The officers pried § 87(2)(b) arms from his chest, at which time § 87(2)(b) shook his body “really hard” to get away from the officers. The officers became scared and moved away

from § 87(2)(b) and § 87(2)(b) fell onto the floor. When he stood up, an officer discharged a Taser into his back.

§ 87(2)(b) initial complaint was consistent with his sworn statement (Board Review 02).

PO Alvarado, PO Modica and PO Ferguson provided statements generally consistent with that of § 87(2)(b). PO Modica and PO Ferguson were consistent in stating that PO Modica initially discharged his Taser against § 87(2)(b) which was ineffective because a Taser dart missed § 87(2)(b) body. PO Ferguson then discharged his Taser, which was effective, and the officers were able to handcuff § 87(2)(b).

The TRI reports prepared by PO Modica and PO Ferguson were consistent with their CCRB statements (Board Review 20).

This portion of the interaction is depicted:

- Beginning at 50:08 minutes in PO Alvarado's first BWC video (Board Review 08). Please note that PO Alvarado's BWC stops recording 20 seconds into the interaction due to the camera becoming detached from PO Alvarado's chest.
- Beginning at 50:15 minutes in PO Modica's BWC (Board Review 09).
- Beginning at 45:19 minutes in PO Alba's BWC (Board Review 10).
- Beginning at 45:30 minutes in PO Ferguson's BWC (Board Review 11)

The BWC footage filmed by the officers depicts officers unsuccessfully attempting to bring § 87(2)(b)'s hands behind his back, PO Ferguson warning § 87(2)(b) multiple times that he is going to deploy his Taser, and § 87(2)(b) leaping up from the bed before he is subjected to the Taser discharges.

Patrol Guide Procedure 221-01 states that force may be used when it is reasonable to place a person in custody (Board Review 28). Patrol Guide Procedure 221-08 classifies the use of a Taser as a "significant intermediate use of force option such as O.C. pepper spray or impact techniques," and states that a Taser should be used to "provide a greater margin of safety for MOS who might otherwise be forced to physically subdue a dangerous subject" (Board Review 29).

In determining whether the use of force is reasonable, members of the service are instructed to consider:

- a. The nature and severity of the crime/circumstances
- b. Actions taken by the subject
- c. Duration of the action
- d. Immediacy of the perceived threat or harm to the subject, members of the service, and/or bystanders
- e. Whether the subject is actively resisting custody
- f. Whether the subject is attempting to evade arrest by flight
- g. Number of subjects in comparison to the number of MOS
- h. Size, age, and condition of the subject in comparison to the MOS

- i. Subject's violent history, if known
- j. Presence of hostile crowd or agitators
- k. Subject apparently under the influence of a stimulant/narcotic which would affect pain tolerance or increase the likelihood of violence.

Officers are instructed to use de-escalation techniques when possible to obviate the need to use physical force (Board Review 28).

§ 87(2)(g)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Allegation (J) Abuse of Authority: Officers damaged § 87(2)(b)'s property.

In both his initial complaint and sworn statement, § 87(2)(b) alleged that after he was subjected to the Taser deployment, he observed officers deliberately kicking around his hard drive and laptop as if they were kicking around a soccer ball (Board Review 02 and 03). § 87(2)(b) provided photographs of the damaged items (Board Review 19).

All officers interviewed by the investigation denied doing this (Board Review 04-06).

PO Ferguson's BWC shows that, at 45:30 minutes, § 87(2)(b) laptop and external hard drive were in front of him on the bed (Board Review 11). At 45:35 minutes, PO Ferguson can be heard stating, "Wait, watch the computer," as the officers begin attempting to apprehending § 87(2)(b). At 45:43 minutes in PO Alba's BWC, an EMT can be seen grabbing the computer as § 87(2)(b) leaps into the air and dropping the computer behind him, causing a loud crashing noise (Board Review 10). At 49:01 minutes in PO Ferguson's BWC, PO Ferguson bends down and picks up § 87(2)(b) laptop, at which time it is visibly damaged (Board Review 11). No officer is depicted intentionally kicking § 87(2)(b) laptop in the manner alleged.

§ 87(2)(g)

[REDACTED]

[REDACTED]

[REDACTED]

Allegation (K) Discourtesy: Sergeant Timothy Burke spoke discourteously to § 87(2)(b)

It is undisputed that Sgt. Burke responded to the location and, in attempting to lift up § 87(2)(b) so he could be transported by EMS, remarked, "Jesus fucking god dammit, he's heavy as fuck." This remark may be heard at 52:43 minutes in PO Alba's BWC (Board Review 10). In his CCRB interview, Sgt. Burke offered no explanation for his choice of language.

Patrol Guide Section 203-10 instructs NYPD officers to refrain from using discourteous and disrespectful remarks towards civilians (Board Review 26).

In Disciplinary Case No. 2013-10143, the Deputy Commissioner of Trials noted that it has repeatedly held that “profane remarks, made during stressful situations or while an officer is trying to get a chaotic situation under control, are not misconduct” (Board Review 30).

§ 87(2)(g)

Allegation (L) Offensive Language: Officers made remarks to § 87(2)(b) based upon race.

§ 87(2)(b) alleged in his sworn statement that, while he was in his room, officers were making statements in Spanish calling him a “negro” (Board Review 03) § 87(2)(b) also alleged that as officers were removing him, an officer whom he could not describe stated, “Oh, this nigga, he really heavy.”

The body-worn camera footage indicates that no officer called § 87(2)(b) a “negro” or “nigga” during the interaction (Board Review 08-15). As discussed in the previous section, Sgt. Burke commented on § 87(2)(b) weight as he was carrying him; however, Sgt. Burke did not remark upon § 87(2)(b) race or ethnicity in the process.

§ 87(2)(g)

Allegation (M) Abuse of Authority: Police Officer Andrew Alvarado searched § 87(2)(b) in the Bronx.

Beginning at 06:15 minutes in his second body-worn camera video (Board Review 12), PO Alvarado is depicted searching through a binder of what appears to contain numerous personal documents belonging to § 87(2)(b) in an effort to obtain his date of birth. In his CCRB interview, PO Alvarado stated that he did this because he did not believe it was possible to prepare an AIDED report without a date of birth (Board Review 04).

In his CCRB interview, Sgt. Burke, the supervisor on scene, affirmed that while it is possible to prepare an AIDED as a “John Doe,” doing so requires a notification to the precinct detective squad and the preparation of a missing / unidentified persons report, which becomes a more involved process (Board Review 07).

As discussed above, all warrantless searches are considered presumptively unreasonable (see People v. Hodge, 44 NY2d 553 [1978], Board Review 24). While there are numerous exceptions to this requirement, being required to prepare additional paperwork absent the search is not one of them.

§ 87(2)(g)

Civilian and Officer CCRB Histories

- This is § 87(2)(b) first CCRB complaint (Board Review 23).
- PO Alvarado has been a member of service for three years. In that time, he has been the subject of 13 allegations in four other cases, none of which have been substantiated § 87(2)(g)
- PO Modica has been a member of service for two years. In that time, he has been the subject of two other allegations in one additional case, which is currently under investigation.
- PO Ferguson has been a member of service for five years and has been the subject of seven allegations in one additional case, none of which were substantiated.
- Sgt. Burke has been a member of service for eight years. In that time, he has been the subject of 13 other allegations in five cases, none of which were substantiated.

Mediation, Civil and Criminal Histories

- This case was not eligible for mediation.
- A FOIL Request filed with the NYC Comptroller's Office on October 4, 2019 indicates that § 87(2)(b) has filed Notice of Claim regarding this incident for \$352.00 (Board Review 21).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Squad No.: _____ 8 _____

Investigator: Charlie Hartford Inv. Hartford 4/23/2020
Signature Print Title & Name Date

Squad Leader: Ethan De Angelo IM Ethan De Angelo 4/23/2020
Signature Print Title & Name Date

Reviewer: _____
Signature Print Title & Name Date

